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No. 82-844

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,

Petitioner,

vs.

RICHARD J. ELROD, Sheriff of Cook County, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JULIUS LUCIUS ECHELES
35 East Wacker Drive
Chicago, IL 60601
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. On appeal from the District Court's denial of petition for writ of habeas corpus: where the Court of Appeals reversed, ruling that the State's reclassification of perjury from a misdemeanor to a felony, after commission of the act for which petitioner was charged, violated his federal constitutional rights under the *ex post facto* clause* because of adverse collateral consequences accruing to felonies but not to misdemeanors, did the Court of Appeals correctly further determine:

(A) that while the said retroactive transformation as to the nature of the offense violated the *ex post facto* clause, the resultant extension of the statute of limitations—a direct consequence of the said reclassification—was nonetheless constitutionally permissible?

(B) that the conviction itself need not be vacated, ruling the sufficient remedy for the *ex post facto* violation was to remand to the District Court with instructions that the cause be remanded to the state court for resentencing under the law in effect at the time of the offense—though petitioner had elected not to be sentenced thereunder?

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* "We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause." (App. A, p. 5; Sl. Op. p. 5).

2. In reaching these results upon the undisputed facts, did the Seventh Circuit misconstrue and misapply *Weaver* v. *Graham*, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that decision?

PARTIES INVOLVED (per rule 21.1(b))

Petitioner, Benedetto J. Massarella, was the petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the Court of Appeals for the Seventh Circuit. Respondents, Richard J. Elrod (Sheriff of Cook County, Illinois) and Tyrone Fahner (Attorney General of Illinois) were respondents in the District Court, and appellees in the Court of Appeals.

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The decision below—that although the collateral consequences of reclassification of perjury from a misdemeanor to a felony render defendant's conviction violative of the *ex post facto* clause, his conviction need not be vacated, but he must be resentenced—emasculates the federal constitutional provision, considering that: (a) this results in defendant being sentenced under the law he elected, at trial-time, *not* to be sentenced under, and (b) extension of the statute of limitations—but for which, defendant could not have been prosecuted at all—was a direct adverse consequence of the said unconstitutional reclassification, such that the conviction itself, not merely the sentence, should be nullified.

Certiorari should be allowed so that this Court may express itself as to whether extension of the statute of limitations, as adjunct to an admittedly unconstitutional retroactive transformation of an offense from

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misdemeanor to felony, is therefore an exception to the usual "rule" that extensions of statutes of limitation are "merely procedural" and, as such, do not violate the *ex post facto* clause.

Certiorari should also be allowed so Your Honors may consider whether the decision below has misconstrued and misapplied *Weaver* v. *Graham*, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that case 8

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NO.

UNITED STATES ex rel. BENEDETTO J. MASSARELLA,
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VS.

RICHARD J. ELROD, Sheriff of Cook County, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Benedetto J. Massarella (hereafter, defendant) respectfully prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit, to review its decision reversing the District Court's order denying his Petition for a Writ of Habeas Corpus and remanding with certain directions, specifically, that he be resentenced by the State court pursuant to the law existing at the time of the offense.

Judgment and Opinion Below

The Opinion of the Court of Appeals for the Seventh Circuit, No. 81-1571, not yet published, is set out as Appendix A, per Rule 21.1(k)(i) of this Court.

Jurisdictional Statement

On July 14, 1982, the Court of Appeals for the Seventh Circuit filed its Opinion herein. (App. A) Defendant's timely Petition for Rehearing was denied on September 23, 1982. (App. B) This petition to review the judgment of a federal court of appeals in a civil case is timely filed within 60 days after denial of petition for rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Rules 20.1 and 20.4 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Sec. 9, cl. 3, United States Constitution, provides:

> "No ex post facto Law shall be passed."

Article I, Sec. 10, cl. 1 of the United States Constitution provides:

> "No State shall . . . pass any . . . ex post facto Law, . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty or property, without due process of law . . ."

The Illinois statutes involved in this cause are:

Chapter 38, Sec. 3-5, Ill. Rev. Stat. 1963:

GENERAL LIMITATIONS

(a) A prosecution for murder, manslaughter, treason, arson, or forgery may be commenced at any time.

(b) Unless the statute describing the offense provides otherwise, or the period of limitation is extended by Section 3-6, a prosecution for any offense not designated in Subsection (a) must be commenced within 3 years after the commission of the offense if it is a felony, or within one year and 6 months after its commission if it is a misdemeanor.

Chapter 38, Sec. 32-2, Ill. Rev. Stat. 1969:

PERJURY

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

• • •

Penalty.

A person convicted of perjury shall be fined not to exceed $1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 14 years, or both fined and imprisoned.

Chap. 38, Sec. 32-2, Ill. Rev. Stat. 1973:

PERJURY

(a) A person commits perjury when, under oath or affirmation, in a proceeding or in any other matter where by law such oath or affirmation is required, he makes a false statement, material to the issue or point in question, which he does not believe to be true.

• • •

(d) Sentence.

Perjury is a Class 3 felony.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

STATEMENT OF THE CASE

Nature of the Case

Petitioner, Benedetto J. Massarella (hereafter, defendant) was found guilty by an Illinois State court jury of theft and perjury for which he was sentenced to 5 years' probation, including 2 years' periodic imprisonment, for theft, and 1 to 3 years' imprisonment for perjury, the sentences to run concurrently. A fine and a restitution order also were imposed.[1]

After exhausting his State remedies,[2] defendant filed a Petition pursuant to 28 U.S.C. 2254, requesting a writ of

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[1] The appeals court was unable to determine from the present record, including the State court opinions, what fine was imposed for what offense. (See App. A, p. 2 & fn. 1; Sl. Op. p. 2 & fn. 1) For the Court's information, a $10,000 fine was part of the sentence imposed on the perjury charge. (State Court Record, R. 337)

[2] On defendant's original appeal, the Appellate Court agreed that the indictment should have been dismissed due to improper participation of the Attorney General, and reversed without deciding the remaining issues. *People* v. *Massarella*, 53 Ill.App.3d 774, 10 Ill. Dec. 912, 368 N.E.2d 507 (1 Dist. 1977). The Illinois Supreme Court allowed the State's petition for leave to appeal, reversed that decision, and remanded to the Appellate Court for resolution of the remaining issues. *People* v. *Massarella*, 72 Ill.2d 531, 21 Ill.Dec. 898, 382 N.E.2d 262 (1978).

In its second opinion, the Appellate Court resolved all issues against defendant, *People* v. *Massarella*, 80 Ill.App.3d 552, 36 Ill. Dec. 16, 400 N.E.2d 436 (1 Dist. 1979). Leave to appeal was denied by the Illinois Supreme Court, and this Court denied defendant's petition for certiorari.

Meanwhile, while the instant habeas proceedings were pending in federal court, petitioner filed in the State trial court a Petition

(footnote continued)

habeas corpus.[3] The District Court granted respondents' motion to dismiss on the pleadings, denied the petition, (App. C), and issued a certificate of probable cause, permitting defendant to appeal.

The Court of Appeals for the Seventh Circuit reversed and remanded "for action not inconsistent with this opinion,"[4] that is, with directions that the District Court (1) determine whether defendant was fined $10,000 for perjury,[5] and (2) remand to the state court " 'to permit the

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(footnote continued)
to Quash Penitentiary Mittimus, treated by the court as a Petition under the Illinois Post-Conviction Hearing Act, Chap. 38, sec. 122 et seq., Ill. Rev. Stat. The court denied the motion; defendant's appeal is pending in the Illinois Appellate Court, No. 82-1348. Its current status is: petitioner-defendant-appellant has filed his Brief; Respondent-appellee has moved to dismiss the appeal on grounds that the intervening decision by the Seventh Circuit [in the instant cause] has rendered the State appeal moot. Having responded thereto per order of the appellate court, we await that court's decision.

In keeping with the judicial philosophy expressed in the concurring opinions in *Marino* v. *Ragen*, 332 U.S. 561, 564, 565, 570, 92 L.Ed. 170, 173, 174, 176 (1947), we include material from this pending State appeal as and where pertinent to the progress of the instant federal proceedings. See fn. 8, *infra*.

[3] In his habeas petition, defendant contended that the perjury conviction was obtained in violation of the *ex post facto* prohibition of the Constitution, and that all the convictions were constitutionally void for various Sixth Amendment violations involving improper limitations on cross-examination and of presentation of defense evidence. Only the *ex post facto* aspect of the case is pressed herein.

[4] App. A, p. 6; Sl. Op. p. 5.

[5] "If so, this fine would be, under the principles noted [in the Seventh Circuit's opinion] above, be an *ex post facto* violation." (App. A, p. 6; Sl. Op. p. 5) See fn. 1, *supra*.

state court to apply, if possible, the law in place when the crime occurred.' "[6]

Jurisdiction of the Trial Court

Jurisdiction in the court of first instance is based on 28 U.S.C. 2241 & 2254, empowering the District Courts to issue writs of habeas corpus.

Statement of Facts

The underlying facts appear in the Appellate Court's first opinion, 53 Ill.App.3d at 775-76, 10 Ill.Dec. at 913-14, 368 N.E.2d 508-09, and are not repeated here to avoid unnecessary duplication. Specific facts as to each of the issues decided in that court's second opinion—including the *ex post facto* issue—are discussed therein. See 36 Ill.Dec. at 22, 400 N.E.2d at 442.

Specific procedural facts pertaining to ex post facto issue

Defendant was indicted (in Count 3) for perjury on the basis of statements made between August 26, 1971 and August 30, 1971. The Illinois statute then prescribing the penalty for perjury was Chap. 38, sec. 32-2, Ill.Rev.Stat. 1969. (See Illinois Appellate Court's second opinion, *supra*, 36 Ill.Dec. at 22, 400 N.E.2d at 442; see App. A, pp. 2-3; Sl. Op. p. 2.) Under Illinois law, in 1971, perjury was classified as a misdemeanor, due to the alternative penalty of imprisonment other than in the penitentiary. *Ibid.*

The indictment here in question was returned June 8, 1973, beyond the 18-month period of limitations for a mis-

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[6] App. A, p. 6; Sl. Op. p. 5. Quoting from *Weaver* v. *Graham*, 450 U.S. 24, 36-37 n.22, 67 L.Ed. 17, 28-29, n.22 (1981).

demeanor,[7] approximately 22 months after the alleged perjury. About a month before the 1971 18-month limitation period expired in February 1973, Illinois' Unified Code of Corrections took effect on January 1, 1973. Under the new Code, perjury is a Class 3 felony, Chap. 38, Sec. 32-2, Ill. Rev.Stat. 1973, with a statute of limitations of 3 years. Chap. 38, sec. 3-5, Ill.Rev.Stat. 1973. (See App. A, pp. 2-3; Sl. Op. 2-3.)

Defendant's motion to dismiss Count 3 on grounds it was barred by the Statute of Limitations, (R. 104,[8] pars. 1 & 21), was denied by the trial court. (R. 134-35, 261-62) In its second opinion, *supra,* the Illinois Appellate Court affirmed. The federal District Court dismissed defendant's petition for a writ of habeas corpus, and the Seventh Circuit reversed and remanded for further proceedings, rejecting the statute of limitations argument but concluding that due to collateral consequences accruing to felonies but not to misdemeanors, reclassification of the offense violated the *ex post facto* clause, requiring that defendant be resentenced under the law in effect at the time of the offense. (App. A)

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[7] See Chap. 38, sec. 3-5, Ill.Rev.Stat. 1963, set out at pp. 2-3, *supra.*

[8] "R." refers to the Record on Appeal in the state court, and "Tr." to the Transcript of Proceedings at trial; references to the state post-conviction petition and defendant's appeal from denial thereof—not of record herein—will be alluded to as appropriate with the prefix, "PC". See fn. 2, *supra.* The Record in the instant cause—that is, the appeal from the District Court's dismissal of the habeas petition—consists mainly of the Petition; the said Record will not be cited by page references herein.

REASONS FOR GRANTING THE WRIT

The decision below—that although the collateral consequences of reclassification of perjury from a misdemeanor to a felony render defendant's conviction violative of the ex post facto clause, his conviction need not be vacated, but he must be resentenced—emasculates the federal constitutional provision, considering that: (a) this results in defendant being sentenced under the law he elected, at trial-time, not to be sentenced under, and (b) extension of the statute of limitations—but for which, defendant could not have been prosecuted at all—was a direct adverse consequence of the said unconstitutional reclassification, such that the conviction itself, not merely the sentence, should be nullified.

Certiorari should be allowed so that this Court may express itself as to whether extension of the statute of limitations, as adjunct to an admittedly unconstitutional retroactive transformation of an offense from misdemeanor to felony, is therefore an exception to the usual "rule" that extensions of statutes of limitation are "merely procedural" and, as such, do not violate the ex post facto clause.

Certiorari should also be allowed so Your Honors may consider whether the decision below has misconstrued and misapplied Weaver v. Graham, 450 U.S. 24 (1981), creating dangerous precedent for inappropriate and unconstitutional reliance on that case.

Introduction

In a *sui generis* opinion, the Seventh Circuit, while agreeing with defendant that his perjury conviction violates the *ex post facto clause,* nonetheless has remanded for resen-

tencing under the provisions in existence at the time of the offense. While we maintain that the conviction itself is void for the constitutional violation, even if one concedes *arguendo* that alteration of the sentence could, in the abstract, remedy such a violation, in *this* case, to apply "the law in place when his crime occurred," (App. A, p. 6; Sl. Op. p. 5), would be to sentence defendant under the very law under which he elected *not* to be sentenced. (App. A, p. 4; Sl. Op. p. 3, text accompanying fn. 3.)

How can this Court countenance that defendant be sentenced under the law under which he elected *not* to be sentenced, as a result of having successfully challenged his conviction? Does this not conflict with the most rudimentary constitutional notions of due process of law?

In effect, this hybrid, nay, mongrel, end result permits the State to have its proverbial cake and eat it, too. Certiorari is appropriate so that this Court may properly decide the seminal issue, which doubtless will have far-reaching effects in other *ex post facto* cases yet to come; that is, how to remedy the constitutional violation which admittedly occurred in this case. In light of defendant's trial-time election, it appears that the remedy suggested by Your Honors in the vastly different factual situation presented by *Weaver* v. *Graham*, 450 U.S. 24, 67 L.Ed.2d 17 (1981), quoted and exclusively relied on by the Seventh Circuit (App. A, pp. 5-6; Sl. Op. p. 5), is utterly inappropriate and unconstitutional in this case.

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Moreover, though the reviewing court agrees an *ex post facto* violation occurred, it so holds only with respect to reclassification of the offense, (App. A, pp. 4-5; Sl. Op. pp. 3-5), not with respect also to the extension of the statute of limitations so as to permit prosecution *at all* within

the time-sequence of events at bar. (App. A, pp. 2-3; Sl. Opp. pp. 2-3) We urge the grant of certiorari to decide the full scope of defendant's *ex post facto* argument; a more sensible, not to mention, constitutional, approach would vacate the perjury conviction in its entirety and would avoid the "difficult" resentencing imbroglio. (See App. A, p. 5; Sl. Op. p. 5.)

Pursuant to this Court's laudable standards for determining which cases to hear by way of the rarely-granted, discretionary writ, certiorari should be allowed.

The "end result" of the decision below on the ex post facto issue—that is, that defendant be resentenced under the "old law"—does not go far enough to vindicate defendnt's federal constitutional rights.

The perjury conviction should be vacated, because on the facts, extension of the statute of limitations—based on the admittedly unconstitutional retroactive transformation of the offense from misdemeanor to felony—unconstitutionally subjects defendant to ex post facto legislation.

The decision to resentence defendant under the "old law" makes inappropriate and unconstitutional use of Weaver v. Graham, directing that he be sentenced contrary to a binding election he was required to make in the state trial court, in further violation of his constitutional rights.

In the State courts[9] and in these federal habeas proceedings, defendant has argued throughout, not only that his felony conviction for perjury violates the *ex post facto* clause because of adverse collateral consequences inherent

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[9] See Statement of Facts, fn. 2, pp. 2-3, *supra*.

in the reclassification of the offense[10] from a misdemeanor to a felony,[11] but also that the extension of the statute of limitations—a *direct* consequence of the said (now, judicially dubbed) unconstitutional reclassification[12]—so as to permit his prosecution for perjury *at all*, violates the *ex post facto* clause as well.

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[10] See App. A, pp. 3-4; Sl. Op. pp. 3-4, & p. 4 fn. 4. In addition to what the Seventh Circuit opines concerning the unconstitutionality of imposing adverse collateral consequences after the fact, *ibid.*, this Court has held, in no uncertain terms, that such disabilities respecting licensing provisions are judicially cognizable "collateral consequences" of a conviction. *Sibron* v. *New York*, 392 U.S. 40, 54 n.14, 20 L.Ed.2d 917, 930 n.14 (1968); *Ginsberg* v. *New York*, 390 U.S. 629, 633 n.2, 20 L.Ed.2d 195, 200 n.2 (1968). Nor are such expressions of recent origin. For similar holdings specifically concerning the *ex post facto* prohibition's applicability over and above the simple question of sentence length, see *Cummings* v. *Missouri*, 71 U.S. 277, 18 L.Ed. 356 (1867), and *Ex Parte Garland*, 71 U.S. 333, 18 L.Ed. 366 (1867), both holding invalid, provisions disqualifying one from holding certain offices or practicing specific professions on the basis of acts already proscribed, where the disqualification was not enacted until after commission of the act.

[11] In typical "have its cake and eat it, too" fashion, see p. 9, *supra*, the State attempted to convince the Seventh Circuit that, almost magically, "Massarella does not now stand convicted of a felony," (App. A, p. 5; Sl. Op. p. 4), although "For determining the period of limitation on Massarella's perjury prosecution, the state unquestionably classed the offense a felony." *Ibid.*

[12] "[T]he state has pointed to nothing to show that Massarella will not suffer the collateral consequences [accruing to felonies] of which he complains. We hold, therefore, that Massarella's conviction of the retroactively reclassified offense of perjury violated the *ex post facto* clause." (App. A, p. 5; Slip Op. pp. 4-5)

The Court of Appeals' determination that extension of the limitations period—a result which was a direct consequence of the reclassification—does not run afoul of the Constitution, (App. A, pp. 3-4; Sl. Op. p. 3), does violence to law, logic, and defendant's rights. Even if, in the abstract, extension of a limitations period does not necessarily violate the *ex post facto* prohibition,[13] on the facts of *this* case, such extension *does* violate that prohibition. Having decided that reclassification of the offense to a felony was constitutionally barred because of adverse consequences accruing to felonies but not to misdemeanors, (see nn. 10 & 12, *supra*), rationally the court should have concluded further that, since extension of the limitations period—undisputedly, a product of the reclassification—was just such an adverse consequence, the extension, too—but for which the perjury offense could not have been prosecuted—violated defendant's right not to be subjected to *ex post facto* legislation. Since in *this* case, extension of the limitations period was not just an isolated legal act, but rather, was a direct consequence of the admittedly unconstitutional reclassification, this consequence, too, must be prohibited by the *ex post facto* clause.

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[13] See App. A, p. 3; Sl. Op. p. 3, where the Seventh Circuit states:

> "Extending a limitation period *before* a given prosecution is barred does not violate the *ex post facto* clause." (Emphasis in original.)

The Court cites and relies on *Clements* v. *United States*, 266 F.2d 397, 399 (9 Cir. 1959), also relying on *Weaver* v. *Graham*, *supra*, in excluding "merely procedural" changes from *ex post facto* applicability. (App. A, pp. 3-4; Sl. Op. pp. 3-4)

Any post-conduct change in the law which is more burdensome to a defendant[14] or which operates to his disadvantage[15]—over and above sentencing considerations—is an *ex post facto* law barred by the Constitution.[16]

Here, reclassification of the offense subjected defendant to a harsher penalty; the possible minimum sentence was thereby increased. When perjury was a misdemeanor, it was within the court's discretion to impose a sentence as miniscule as a day in jail or a one-cent fine; while as a felony, if a sentence of incarceration was imposed, it had to be at least 366 days.[17] By thus increasing the possible minimum incarceration sentence, the reclassification renders unconstitutional the entire statutory scheme as applied to defendant. *Lindsey* v. *Washington*, 301 U.S. 397,

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[14] *See Dobbert* v. *Florida*, 432 U.S. 282, 292, 53 L.Ed.2d 344, 356 (1977), quoting with approval from *Beazell* v. *Ohio*, 269 U.S. 167, 169-70, 70 L.Ed. 216, 217 (1925).

[15] See *Kring* v. *Missouri*, 107 U.S. 221, 235, 27 L.Ed. 506, 511 (1882), quoting *United States* v. *Hall*, 26 Fed. Cas. No. 15,285, p. 84, 2 Wash. (C.C.) 366, *aff'd*, 10 U.S. (6 Cranch) 171, 3 L.Ed. 189 (1810), quoted and relied on in *Geraghty* v. *United States Parole Comm'n*, 579 F.2d 238, 264 (3 Cir. 1978).

[16] "[The following kinds of laws are] *ex post facto* laws within the words and intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which innocent when done, criminal; and punishes such action. 2d. *Every law that aggravates a crime, or makes it greater than it was, when committed.* 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence . . . in order to convict the offender." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648, 650 (1798). (Emphasis added.)

[17] See App. A, p. 3; Sl. Op. p. 2 & fn. 2.

402, 81 L.Ed. 1182, 1186 (1937) (*ex post facto* clause "looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed.").[18]

Because of these factors over and above the collateral consequences (license limitations, civil rights, etc.) recognized by the Seventh Circuit, which accrue to felonies as opposed to misdemeanors—that is, extension of the statute of limitations, and the subjection of defendant to a greater minimum sentence—the court's decision that defendant be resentenced under the old law is unconstitutional.

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The Seventh Circuit's decision to order defendant resentenced under the law in effect at the time of the offense is further erroneous and unsatisfactory for two additional, independent reasons, each of which should pique the interest of the Court. As is more fully hereafter elaborated:

First, in reaching this unique and unsupportable conclusion, the court has relied upon inapposite authority which, on closer scrutiny, redounds to defendant's benefit. More precisely, the court's reliance upon *Weaver* v. *Graham, supra,* as its sole authority supporting the resentencing aspect of the opinion, puts Your Honors' recent decision therein to unsuitable and unconstitutional use which we are confident this Court will be eager to condemn.

Secondly, this selection of remedy places defendant in the constitutionally impermissible position of being resentenced under the very law he had elected not to be sen-

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[18] See also *People* v. *Wyckoff,* 106 Ill.App.2d 360, 245 N.E.2d 316 (2 Dist. 1969) (amendment increasing possible minimum sentence, invalid as *ex post facto* law).

tenced under, when made to choose in the trial court. (See Tr. 2295-97, 2302.)

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While acknowledging that "The matter of remedies is a difficult one in this case," (App. A, p. 5; Sl. Op. p. 5), the court rejects defendant's argument that the conviction is wholly invalid and should be vacated, directing that he be resentenced under the old law, on the basis of the following authority, set out herein in its entirety:

> "Massarella seeks an unconditional writ that would have the effect of vacating his perjury conviction. The Supreme Court, however, has noted that '[t]he proper relief upon a conclusion that a state prisoner is being treated under an *ex post facto* law is to remand to permit the state court to apply, if possible, the law in place when the crime occurred.' *Weaver* v. *Graham*, *supra*, 450 U.S. at 36-37 n.22." (App. A, pp. 5-6; Sl. Op. p. 5)

However, as Your Honors well know, *Weaver* does *not* involve a sentencing determination; rather, it deals solely with the method of computing "good time" while in prison. *Weaver* v. *Graham* held that the revised law, resulting in more lengthy incarceration than the prior law, was "void as applied to petitioner, whose crime occurred before its effective date." 450 U.S. at 36, 67 L.Ed.2d at 28. It is one thing to compute "good time" in accordance with one formula or another; it is quite another to apply judicial sentencing discretion under two vastly different laws. *Weaver*'s footnote 22, quoted and exclusively relied on by the Seventh Circuit, should not be deemed controlling on the admittedly "difficult" matter of remedies.

Nor do the cases cited in the *Weaver* footnote support the decision below. Both *Lindsey* v. *Washington*, *supra*, and *Ex Parte Medley*, 134 U.S. 160, 33 L.Ed. 835 (1890),

hold that whether the "old" law still may be imposed after the Court had determined the "new" law was void for violation of the *ex post facto* clause, is a question of State law for the State courts. As the Court put it in *Medley*—a capital case wherein the result in defendant's favor not only relieved him of the supreme penalty but even ordered his discharge from custody:

> "[I]t is apparent that while the Statute under which he is now held in custody is an *ex post facto* law in regard to his offense, *it repeals the former law*, under which he might otherwise have been punished, and we are not advised whether that court possesses any power to deal further with the prisoner or not. Such a question is not before us, because it has not been acted on by the court below, and it is neither our inclination nor our duty to decide what the [state] court may or what it may not do in regard to the case as it stands." *Id.* at 174, 33 L.Ed. at 841. (Emphasis added.)

Applying this rationale to the case at bar, the passage of the new law operated to repeal the old law, so that it is not now possible to sentence Massarella under the old law.

Secondly, defendant was made to elect in the trial court whether to be sentenced under the new law or the old law. (Tr. 2295-97; 2303) He chose the new law.[19] (See App. A,

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[19] Defendant's election is the subject of one aspect of the still-pending State post-conviction proceedings. See nn. 2 & 8, *supra*. Adding to the tangled web concerning remedies, the Appellate Court in its second opinion hinged its ultimate conclusion on the *ex post facto* issue against defendant upon its perception that defendant had made a valid election to be sentenced under the new law: "Massarella elected to be sentenced under the Unified Code of Corrections." 36 Ill.Dec. at 22, 400 N.E.2d at 442. In denying the post-conviction petition, the trial court specifically held that the Appellate Court's second opinion was *res judicata*, (PC R. 19-20), and stressed that defendant did not claim a right or desire to be sentenced under the old law. (PC R. 19)

p. 4; Sl. Op. p. 3, & fn. 3.) The decision below, requiring that he be resentenced under the old law, cannot be implemented without doing grave violence to defendant's most basic constitutional rights as embodied in the concept of due process of law. Although the court admonishes that no "more onerous sentence" be imposed, (App. A, p. 6; Sl. Op. p. 5), the constitutionally-required standard, of course, is not the sentence actually imposed, but rather, that which theoretically could be imposed. *Lindsey* v. *Washington, supra,* 301 U.S. at 402, 81 L.Ed. at 1186.

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The Seventh Circuit's decision acknowledges the *ex post facto* infirmity of the proceedings, particularly in stating that, if defendant was fined $10,000 for his perjury conviction,[20] "this fine would, under principles noted above, be an *ex post facto* violation." (App. A, p. 6; Sl. Op. p. 5) It makes no sense to attempt to salvage, in piecemeal fashion, this unconstitutionally wrought conviction which is defective in each of the aspects elaborated above.

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The Court should be loathe to permit this convoluted and confusing decision, diluting and emasculating the *ex post facto* prohibition, to stand as the law of the land.[21]

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[20] As he was. See fn. 1, *supra;* R. 337.

[21] Unlike many Court of Appeals' decisions, which, per local Rule, remain buried in the unpublished annals as non-precedential cases known only to the parties, (see Seventh Circuit Rule 35), the instant decision was promulgated as an opinion which, in the normal course of events, will wend its way into the federal reporter system [F.2d]; a foregone future fact which, we submit, should weigh in the preliminary decision this Court must make—whether to select this case for determination on certiorari.

Certiorari should be allowed for a rational resolution of the serious and meritorious constitutional questions raised in these proceedings—especially considering the contextual misuse to which *Weaver* v. *Graham* so tortuously has been put. This case is an excellent vehicle whereby Your Honors can explicate *ex post facto* issues of far-reaching import within the criminal justice system beyond the factual scope of the situation presented by *Weaver*. The Court should welcome the opportunity to deal with the questions posed by this case.

CONCLUSION

For any or all of the foregoing reasons, the Petition for Certiorari should be allowed. And, on the merits, the Seventh Circuit's order should be reversed and the cause remanded to the District Court with instructions to vacate defendant's conviction and grant the Great Writ.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner